

October 23, 2001

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Cristin L. Rothfuss, Esq.  
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585 Boylston Street, Suite 200  
Boston, Massachusetts 02116

Re: Cape Light Compact Default Service Pilot Project, D.T.E. 01-63

Dear Mr. Bernstein and Ms. Rothfuss:

I. Introduction

On August 15, 2001, the Cape Light Compact ("Compact")<sup>1</sup> requested that the Department of Telecommunications and Energy ("Department") approve a pilot project for default service ("Pilot Project" or "Pilot"), pursuant to Section 339 of the Acts of 1997 ("Electric Restructuring Act" or "Act") ("Filing"). Through the Pilot Project, the Compact seeks to provide electric power supply to approximately 42,000 default service customers within its twenty-one member communities. This matter was docketed as D.T.E. 01-63. The

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<sup>1</sup> The Cape Light Compact was formed in 1997 through an intergovernmental agreement of twenty-one towns and two counties for the purpose of establishing competitive power supply, energy efficiency, and consumer advocacy. The member towns consist of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, and Yarmouth.

Compact seeks expeditious approval of the Pilot so that it may shortly execute a supply agreement and begin providing service to customers after January 1, 2002.

On August 24, 2001, the Department issued a Notice of Filing and Request for Comments regarding the Pilot Project. The Department received comments and reply comments from nine commenters along with letters of support from seven legislators.<sup>2</sup>

## II. Description of the Pilot Project

On August 10, 2000, the Department approved the Compact's municipal aggregation plan ("Aggregation Plan"). Cape Light Compact, D.T.E. 00-47 (2000). Participation in this Aggregation Plan is open to both standard offer service and default service customers. However, implementation of the Aggregation Plan requires that the plan's price be lower than the standard offer service price. The Compact states that implementation has been delayed because standard offer service prices continue to be below market-based prices (Filing at 1).

The Compact states that the proposed Pilot Project is based upon its Aggregation Plan, approved in D.T.E. 00-47, except that participation will be limited to the approximately 42,000 default service customers within its member communities (Filing at 1-2). The Compact contends that market conditions are such that wholesale market prices are lower than existing default service prices, thus creating an opportunity for the Compact to provide savings to these default service customers (Filing at 2). As with the Aggregation Plan, all default service customers would be enrolled automatically in the Pilot Project, except for those customers who exercise their ability to opt-out and, therefore, to remain on default service (id. at 3).<sup>3</sup> The

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<sup>2</sup> Comments were received from the Commonwealth of Massachusetts Division of Energy Resources ("DOER"); the Office of the Attorney General ("Attorney General"); Citizens Energy Corporation ("Citizens"); Consumer Assistance Council, Inc. ("CAC"); Dominion Retail, Inc. ("Dominion"); Duke Energy Trading and Marketing, LLC ("DETM"); Commonwealth Electric Company d/b/a NSTAR Electric ("NSTAR"); IRATE Inc. ("Irate"); Mr. Joseph M. Zdanovich; and the joint filing of the Low-Income Energy Affordability Network ("LEAN"), the Massachusetts Energy Directors Association ("MEDA"), and the Massachusetts Community Action Program Directors Association, Inc ("MASSCAP") (collectively, the "Low-Income Commenters"). The legislators who filed comments include Representatives Atsalis, Bosley, Gomes, and Patrick, and Senators Morrissey, Murray, and O'Leary.

<sup>3</sup> In addition, all new default service customers would be enrolled automatically in the Pilot Project, unless they choose to opt-out (Compact Filing at 3,7).

Compact proposes to implement the Pilot Project for a 15-month period beginning, beginning January 1, 2002,<sup>4</sup> the start of NSTAR's next six-month default service pricing cycle (id. at 3, 8).<sup>5</sup> The Compact states that it may seek Department approval to extend the term of the Pilot Project, depending on the success of the Project in its initial term (id. at 4). Implementation of the Pilot will be overseen by the Compact's governing board, supported by its power supply committee and technical and legal team (id. at 5).

The Compact proposes a two-tiered Department review and approval process. First, the Compact requests that Department approval of the non-price components of the Pilot Project, based on the information included in its August 15, 2001 filing (id. at 3). Upon receiving Department approval, the Compact states that it will execute a power supply agreement with a competitive supplier to serve the Pilot's load, and will submit the agreement, including prices, for Department approval (id. at 9; Compact Reply Comments at 6, 12-14). The Compact requests that the Department limit the timing of its review of the price-related terms to a five business day period, unless the Department determines, during the five-day period, that a more extensive investigation is warranted (Compact Filing at 9; Compact Reply Comments at 6). The Compact states that this review schedule will allow it to enter into a finalized contract with a supplier by October 31, 2001 (Compact Filing at 9).

Upon Department approval of the power supply agreement, the Compact will mail notices, consistent with its Aggregation Plan, to default service customers that will (1) inform customers they have the ability to opt-out and explain the opt-out process, and (2) prominently state all Pilot charges and compare the price and primary terms of the Pilot to those of default service (id. at 7). In addition to the direct mailing, the Compact will inform and educate consumers about the Pilot Project and consumers' ability to opt-out via newspaper notices, public service announcements, posting of notice in town halls, and notification of customer in their last bill that new service will be initiated by the Pilot's supplier (id. at 6). In addition, the Compact will require the Pilot Project's supplier to establish a telephone call center in order to address questions from Project participants (id. at 7-8).

Finally, the Compact states that, as part of the Pilot, it will submit a report to the Department and DOER outlining the "experience, information, data and lessons learned on key market issues." The report will address issues such as program costs, the notification and opt-out process, and consumer reaction (id. at 5).

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<sup>4</sup> The Compact states that suppliers are reluctant to provide supply beyond March 31, 2003 because of uncertainty regarding the implementation of congestion management pricing in the wholesale market (Compact Filing at 3, n.1)

<sup>5</sup> Default service customers that do not opt-out will be enrolled on their meter read dates during January 2002 (Compact Filing at 7).

### III. Summary of Comments

DOER, the Attorney General, Citizens, CAC, the Low-Income Commenters, Representatives Atsalis, Bosley, Gomes, and Patrick, and Senators Morrissey, Murray, and O'Leary submitted comments in support of the Pilot Project. The commenters generally state that the Pilot Project should offer much-needed bill reductions to default service customers and is consistent with the larger objectives of municipal aggregation (DOER Comments at 1; Attorney General and DOER Reply Comments at 1;<sup>6</sup> Citizens Comments at 1; CAC Comments at 1; Low-Income Commenters at 1,2). Senator Morrissey and Representative Bosley state that the Pilot Project is "entirely in keeping with the intent" of Section 339 of the Electric Restructuring Act. Additionally, commenters contend that the Pilot's participants will have the opportunity for savings without adversely affecting non-participants, and further, that approval of the Pilot Project prior to the submission by the Compact of a power contract for approval will not predetermine the appropriateness of the power contract itself (Attorney General and DOER Reply Comments at 2).

NSTAR states that it generally supports the Pilot Project, but that the Department should not approve the Pilot until the Department has had the opportunity to review and approve the Compact's supply contract to ensure that the Pilot's prices are lower than default service prices (NSTAR Comments at 2; NSTAR Reply Comments at 1). NSTAR argues that it has several timing and logistical concerns that it looks forward to clarifying with the Compact. To the extent that the Pilot Project is not approved prior to October 27, 2001, NSTAR states that it will need additional time after January 1, 2002 to begin switching customers to the Compact's supplier (NSTAR Comments at 4-7; NSTAR Reply Comments at 1,2).

Dominion, DETM, and Irate oppose the Pilot Project. Dominion contends that the opt-out provision is anti-competitive and will result in reduced competitive choices for consumers. Instead, Dominion argues that an opt-in system will be less likely to discourage market suppliers from engaging in business in Massachusetts (Dominion Comments at 1). DETM states that the Pilot Project is inconsistent with specific aggregation requirements in G.L. c. 164, § 134 and § 339 of the Act because it limits participation to default service customers (DETM Comments at 1-3). In response, the Compact contends that it will provide universal access under its Aggregation Plan as soon as the market allows, and that the Pilot should be viewed as the first stage of implementation rather than a separate aggregation plan (Compact's Reply Comments at 17-18). Further, the Compact argues that Section 339 does not require universal access, rather the Compact contends that Section 339 authorizes the Department and DOER to establish pilots that further the goals of those municipal aggregation programs created in connection with G.L. c. 164, § 134 (*id.* at 18).

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<sup>6</sup> On October 2, 2001, the Attorney General and DOER filed Joint Reply Comments in support of the Compact's Pilot.

DETM argues that, as NSTAR's current default service supplier, the switching of 42,000 default service customers will have an adverse financial impact on DETM (DETM Comments at 1, 4-5). Irate argues that to promote competition in the Cape Cod community, the Department should authorize the Compact to compete with NSTAR for default service customers rather than approve the Compact's Pilot Project (Irate Comments at 1).

#### IV. Analysis & Findings

Section 339 of the Electric Restructuring Act ("Section 339") directs the Department and DOER to establish a pilot program to implement the provisions of G.L. c. 164, § 134. The Department previously has found that the Compact's Aggregation Plan satisfied the provisions of G.L. c. 164, § 134, which require that: (1) municipal aggregators obtain necessary governmental approvals; (2) such aggregators consult with DOER and consumers in the development of the plan; (3) municipal aggregation plans provide for universal access; (4) such plans be designed so as to ensure reliability; (5) such plans provide for equitable treatment of all classes of customers; (6) prices be set at a level that will not exceed standard offer prices; and (7) municipal aggregators establish a customer education plan to inform customers about the aggregation plan and their ability to opt-out. D.T.E. 00-47, at 23-26. The Pilot Project will be implemented consistent with the terms of the Compact's Aggregation Plan, except for two provisions that conflict with the requirements of G.L. c. 164, § 134: (1) participation in the Pilot Project will be limited to default service customers, and (2) the price benchmark for the Pilot Project will be NSTAR's default service price, rather than its standard offer service price.

While Section 339 directs the establishment of pilot program to implement the provisions of G.L. c. 164, § 134, it does not require that these programs meet every requirement of this section. Pilot programs are, in general, provided a certain level of flexibility to differ from existing programs in order to provide information that may be used to improve the manner in which the existing programs are designed and implemented in the future. The Department concludes that, while pilot programs designed pursuant to Section 339 need not meet each requirement of G.L. c. 164, § 134, such programs must be consistent with both the specific objective of G.L. c. 164, § 134, to promote municipal aggregation, and the objective of the Electric Restructuring Act, to achieve the benefits of competition in generation service (see Section 1(k) of the Act).

As of March 1, 2005, distribution companies will no longer offer standard offer service to their customers -- as of that date, standard offer customers will be switched to default service. As such, the provisions of G.L. c. 164, § 134(a) requiring municipal aggregation efforts to produce prices lower than standard offer prices will cease to be viable. If municipal aggregation activities are to continue after that date, the applicable customer base will be default service customers, the same customer base used in the Pilot Project. Because the Pilot Project's focus on default service customers is representative of the focus of future (i.e., post-March 1,

2005) municipal aggregation plans, implementation of the Pilot is consistent with the objective of G.L. c. 164, § 134 to promote municipal aggregation. The Compact's report on the Pilot Project should provide a great deal of empirical information about the mechanics associated with implementing a municipal aggregation plan and consumers' reactions to participating in such a plan, information that should be particularly useful to municipalities that may seek to develop municipal aggregation plans in the future.

Despite its promotion of municipal aggregation, we note some concern about the long-term effects of programs such as the Pilot Project with respect to the promotion of competition. We appreciate the short-term potential of the Pilot to promote municipal aggregation. However, implementation of the Pilot, with its focus on default service customers, may have a chilling effect on suppliers entering the market, thus working counter to the Act's objective of broadening the competitive options available to consumers. The ultimate success of the electric restructuring effort in the Commonwealth relies on the presence of a sufficient number of suppliers competing against one another to provide generation service to consumers. In the near-term, it is likely that suppliers will focus their efforts on default service customers, because these customers pay prices that are market-based. Implementation of an aggregation plan such as the Pilot, with its opt-out provision, may discourage competitive suppliers from marketing their services in the near-term to default service customers because of their conviction that they can not fairly compete against such a plan and the uncertainty regarding future such efforts throughout the Commonwealth. The absence of these suppliers could jeopardize the long-term success of the competitive marketplace.<sup>7</sup>

Notwithstanding these concerns, because the Department will have the opportunity to review the performance of the Pilot after a 15-month period, and because the 42,000 default service customers on Cape Cod represent only approximately six percent of Massachusetts' default service customers,<sup>8</sup> we conclude that the benefits of the Pilot Project outweigh the short-term potential barriers to the development of the competitive market. The limited scale and 15-month term of the Pilot Project will give the Department and others an opportunity to study the effects of the Pilot with respect to the development of the competitive market.

However, to mitigate against potential barriers the Pilot Project may have on the competitive market, the Department directs the Compact to compile a list of consumers (including name, address and rate class) who are participating in the Pilot and to make this list

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<sup>7</sup> Conversely, it is plausible that some suppliers may view serving a municipal aggregation load as an attractive opportunity to gain a sizable portion of market share.

<sup>8</sup> According to DOER's customer migration data, there were approximately 682,000 default service customers in Massachusetts as of August 2001.

available to licenced competitive suppliers upon request. In order to receive this information, a supplier must execute an agreement with the Compact requiring the supplier not to use this information for any purpose other than to market electricity-related services. See Competitive Market Initiatives, D.T.E. 01-54, at 6 (2001). In addition, the Department concludes that the application of an “exit fee” (i.e., a fee, or penalty, that would be imposed on a consumer that leaves the Pilot to either return to default service or to switch to a different competitive supplier) is unacceptable because it is incompatible with an opt-out approach to aggregation, and has clear anti-competitive implications. The Department will not approve any power supply agreement that includes such an “exit fee” provision. These two requirements are necessary to balance the Act’s and our desire to promote competition and individual choice for default service customers along with the potential benefits of a pilot aggregation plan for default service that compels customer participation.

With respect to the comments submitted by DETM, we note that it is the responsibility of suppliers in default service solicitations to submit bid prices that take into account risks associated with fluctuations in the default service load, including those fluctuations that may result from aggregation efforts being undertaken in the relevant service territories. In the specific case of the Commonwealth Electric Company service territory, it is incumbent on potential default service suppliers to be fully informed on the status of the Compact’s well-known aggregation efforts.

Consistent with the above analysis, the Department concludes that the Pilot Project is an acceptable pilot program pursuant to Section 339. Therefore, the Department approves the non-price terms of the Pilot Project, as included in the Compact’s August 15, 2001 filing. The Department directs the Compact to submit its power supply agreement with the supplier selected to serve the Pilot. The Compact’s filing on this matter should clearly state all program-related charges that will be paid by participants in the Pilot. Consistent with the Compact’s request, the Department will review the agreement within five business days, unless we determine during that period that further investigation is warranted. The Department previously has adopted such an approach in our review of the results of default service solicitations, stating that it strikes an appropriate balance between allowing sufficient time for Department review and being responsive to the manner in which competitive market work. Default Service Pricing and Procurement, D.T.E. 99-60-C (2000). The Department directs the Compact to work with NSTAR to develop the procedures necessary for the enrollment both of existing and new default service customers.

Finally, the Department directs the Compact to submit its report on the Pilot Project no later than January 31, 2003, in order to give the Department sufficient time to review the report prior to the end of the initial term of the Pilot. The report shall explicitly address any effect the implementation of the Pilot has had on the competitive market. The Department will consider an extension of the Pilot Project only if we are convinced that such an extension will not jeopardize the long-term success of the competitive marketplace.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner



